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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 661

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD, AS TREASURER OF THE STATE OF COLORADO, BYRON ANDERSON, AS SECRETARY OF STATE OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOSEPH F. LITTLE, AND WILBUR M. SALTER,

Appellants,

vs.

ANDRES LUCAS AND ARCHIE L. LISCO, INDIVIDUALLY AND AS CITIZENS OF THE STATE OF COLORADO, TAXPAYERS, AND ELECTORS THEREIN, FOR THEMSELVES AND FOR ALL OTHER PERSONS SIMILARLY SITUATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

MOTION TO DISMISS OR AFFIRM

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1. Appellees hereby move this Honorable Court to dismiss this appeal or, alternatively, to affirm the judgment sought to be reviewed on appeal from the United States District Court for the District of Colorado on the ground that it is manifest that the questions on which the decision of this appeal depend are so insubstantial as to need no further argument.

2. The facts upon which the Motion are based are as follows:

2.1. The present Appellees, as appellants, heretofore appealed to this Court in *Lucas vs. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 84 S.Ct. 1472 (No. 508, October Term, 1963) from a judgment of the United States District Court for the District of Colorado, sitting as a statutory court of three judges, denying injunctive relief with reference to an Amendment to the Constitution of the State of Colorado, sometimes referred to and usually called "Amendment No. 7".

2.2. This Court accepted jurisdiction and, on June 15, 1964, rendered an Opinion reversing the judgment of the District Court, holding that under the provisions of Amendment No. 7, there was a failure to comport with the requirements of Equal Protection of the Laws under the 14th Amendment, remanding the case to the District Court for further proceedings, including determination as to whether the imminence of the 1964 general elections required the use of the scheme provided in the invalidated Amendment 7.

2.3. That the right of re-hearing in No. 508, October Term, 1963, was waived, and the parties requested this Court to send down its judgment to the District Court, which was done.

2.4. Immediately on transmittal of the judgment to the District Court, and in accordance with the judgment and the opinion of this Court, the District Court held, on June 26, 1964, a hearing at which all parties were present by counsel and heard.

2.5. At the conclusion of that hearing, the District Court announced from the bench a ruling that on the question of severability of Amendment Number 7, Judges Doyle and Breitenstein felt that Amendment 7 was not severable and hence must fail in toto, Judge Arraj dissenting from that portion of the ruling. At the same hearing, argument was had as to whether, under Article V, Section 47, of the Colorado Constitution as it pre-existed Amendment No. 7, subdistricting was or was not allowable. Judges Arraj and Breitenstein concluded that the provision of the State Constitution permitted subdistricting; and Judge Doyle that it did not.

2.6. The District Court unanimously found and determined that the imminence of the 1964 elections did not require the utilization of the apportionment scheme contained in the invalidated Amendment No. 7, that the time available was sufficient for the State of Colorado to take action which would effectuate the decision of the Supreme Court of the United States, and that the matter accordingly be set over to July 15, 1964, for advice to the District Court as to what State action had been taken, absent which action the District Court would carry out the duty prescribed in the mandate from the Supreme Court.

2.7. Following those hearings, the Governor of Colorado convened a special session of the General Assembly, which duly met, and after deliberation advised the District Court that there had been enacted a reapportionment measure, introduced as Senate Bill No. 1 of the Special Session. Certain other bills were introduced to modify the election laws of the State in view of certain time problems arising, but with which bills this proceeding is in no manner concerned.

2.8. Senate Bill No. 1 was enacted under the old provisions of the Colorado Constitution, disregarding Amendment 7 entirely, but assuming, as ruled by the District Court, that Article V, Section 47, of the Colorado Constitution as it pre-existed Amendment 7 permitted creation of single-member districts.

2.9. The Bill assumed a Senate of 35 members, provided by the Colorado constitution prior to Amendment 7, and made a distribution of members in both the House and Senate which these Appellees, as Plaintiffs, advised the Court was within reasonable numerical limits, as concerns the Fourteenth Amendment.

2.10. The said bill as enacted was signed by the Governor of Colorado.

2.11. Thereafter, there was entered a written order, judgment, and decree signed by the Court on July 13, 1964, as of July 8, 1964, printed as Appendix A of the Jurisdictional Statement, incorporating *in haec verba* the provisions of the Act, and further ordering that the primary and general elections of the General Assembly for 1964 be conducted in accordance with the provisions of the Bill, and in the manner and in accordance with the apportionment and establishment of representative districts therein made.

2.12. The Court retained jurisdiction of the action. The order, judgment, and decree was approved as to form by counsel for all parties.

2.13. Two actions were filed before the Supreme Court of the State of Colorado, being respectively *White*

vs. Anderson, et al., 394 P.2d 333, and *McDonald, etc. vs. Love*, 394 P.2d 345. Each of these actions raised the question whether or not single member districts could, as a matter of State Constitutional Law, be validly allowed under Article V, Section 47, of the Colorado Constitution, as it existed prior to the invalidated Amendment 7, and providing as follows:

> "Senatorial and representative districts may be altered from time to time, as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the districts as compact as may be. *No county shall be divided in the formation of a senatorial or representative district.*" (Emphasis supplied).

The Colorado Supreme Court, rendering decisions in those cases, recognized the invalidation of Amendment 7 by the Federal Court, recognized that the prior provisions of the Colorado Constitution were in effect, held (in this respect differing from the majority of the United States District Court) that the quoted section, part of which is emphasized above, did prohibit subdistricting, and ruled that though the act providing for subdistricting was resultantly invalid, the provisions as to apportionment therein made did conform, as held by the United States District Court, to the requirements of the Fourteenth Amendment, and that, accordingly, the 1964 elections should be held as ordered by the United States District Court, in pursuance of orders of this Court.

2.14. The 1964 elections were held, and the General Assembly was elected in accordance with the apportion-

ment made as above indicated, and in conformance with the orders of the United States District Court.

3. This Court has invalidated Amendment 7. The United States District Court has held that that invalidation is complete. The Colorado Supreme Court has accepted the fact that the Amendment, Amendment 7, is invalid in its entirety, and that the pre-existing provisions of the Colorado Constitution are in effect. The instant appeal attempts to inject into the Colorado Constitution fragments of a single amendment, which adopted and submitted as an entirety, must fall as an entirety. These matters, we respectfully submit, were fully decided by this Court heretofore, and no substantial question is presented to this Court for determination here.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION

A. Prior ruling of this Court.

As was discussed at length in the Briefs in No. 508, October Term, 1963, there were submitted, at the 1962 elections, two substantial amendments to the Constitution of Colorado, one of them denominated No. 7 and one of them called No. 8. Each purported to repeal the existing Constitutional provisions on apportionment and concerning the composition of the Colorado General Assembly, Article V, Sections 45, 46, and 47 of the Colorado Constitution.

The United States District Court, in its majority opinion, remarked that there was a choice offered the voters, and seemed to be of the opinion that their selection of Amendment 7 had some prepotent effect. This Court spe-

cifically disagreed, remarking that there were no clear-cut choices presented, that there were numerous aspects to each of the amendments proposed, and that it was a difficult thing to give any specific weight to the approval of either of these schemes of amendment, involving packages of provisions, not separately approvable or approved.

Amendment 7, printed in the Jurisdictional Statement, pages 4 and 5, is a single Act, entitled as such, and denominated "An Act to amend Article V of the State Consittution providing for the apportionment of the Senate and House of Representatives of the General Assembly and providing for Senatorial Districts and Representative Districts." Section 45, as proposed to be changed, increases the number of members of the Senate to 39, provides for a House of 65 members, and provides for single-member districts. Section 46 provides that the House districts shall be as nearly equal in population as may be. Section 47 also provides for a 39-member Senate, for an apportionment upon the basis of a pre-existing statute, adding four members and designating the districts to which they shall be assigned, and requires multiple-member districts to be sub-divided on population basis as nearly as may be, but perpetually freezes other districts. Section 48 provides for future apportionments.

The Court concluded that "the choice presented to the Colorado electorate, in voting on these two proposed constitutional amendments, was hardly as clear-cut as the Court below regarded it", and further that "*neither of the proposed plans was, in all probability, wholly acceptable to the voters in the populous counties,* and the assumption of the Court below that the Colorado voters made a definitive choice between two contrasting alternatives

and indicated that 'minority process in the Senate is what they want' does not appear to be factually justifiable."

This Court has specifically recognized that the problem of single-member, as opposed to multiple-member, districts was an integral matter, part and parcel of the entire dispute, and inseparable therefrom, stating, at page 17 of its Opinion:

> "As appellees have correctly pointed out, a majority of the voters in every county of the State voted in favor of the apportionment scheme embodied in Amendment No. 7's provisions, in preference to that contained in proposed Amendment No. 8, which, subject to minor deviations, would have based the apportionment of seats in both houses on a population basis. However, the choice presented to the Colorado electorate, in voting on these two proposed constitutional amendments, was hardly as clear-cut as the court below regarded it. One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies *within* the populous counties resulted, and residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multimember county represented the county as a whole. Amendment No. 8 as distinguished

from Amendment No. 7, while purportedly basing the apportionment of seats in both houses on a 'population basis, would have perpetuated, for all practical purposes, this debatable feature of the existing scheme. Under Amendment No. 8, Senators were to be elected at large in those counties given more than one Senate seat, and no provision was made for subdistricting within such counties for the purpose of electing senators. Representatives were also to be elected at large in multimember counties pursuant to the provisions of Amendment No. 8, at least initially, although subdistricting for the purpose of electing House members was permitted if the voters of a multimember county specifically approved a representative subdistricting plan for that county. Thus, neither of the proposed plans was, in all probability, wholly acceptable to the voters in the populous counties, and the assumption of the court below that the Colorado voters made a definitive choice between two contrasting alternatives and indicated that 'minority process in the Senate is what they want' does not appear to be factually justifiable."

There was no question raised that any inherent unconstitutionality obtains in electing members at large, and indeed, in footnote 21 to its Opinion, this Court indicates the contrary: "We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties."

What is even more to the point, this Court has recognized that the apportionment scheme adopted by Amendment No. 7 is a single fabric. Discussing the fact that even assuming apportionment of the House to be valid under the challenged amendment, the amendment is nonetheless invalid, this Court stated, at pages 20 and 21 of its Opinion:

> "We need not pass on this question, since the apportionment of Senate seats, under Amendment No. 7, clearly involves departures from population-based representation too extreme to be constitutionally permissible, and there is *no indication that the apportionment of the two houses of the Colorado General Assembly*, pursuant to the 1962 constitutional amendment, *is severable.*" (Emphasis supplied)

In footnote 27 to its Opinion, this Court points out the necessity for viewing the legislative apportionment under consideration *as a totality* for purposes of determining constitutionality: "Consistent with this approach, in determining whether a good faith effort to establish districts substantially equal in population has been made, *a court must necessarily consider a State's legislative apportionment scheme as a whole.*" (Emphasis supplied).

The final conclusion of this Court was that "under neither Amendment No. 7's plan, nor, of course, the previous statutory scheme, is the overall legislative representation in the two houses of the Colorado Legislature sufficiently grounded on population to be constitutionally sustainable under the Equal Protection Clause."

It is submitted, most respectfully, that this Court having recognized that neither Amendment 7 nor Amendment

8 was in probability wholly acceptable to the voters of Colorado; it being further recognized that there is no indication that the apportionment of the two houses under Amendment 7 is severable; it having been recognized that apportionment legislation must be viewed as a totality; there having been but a single bill presented to the Colorado people, and no right to vote separately on the several aspects of it; and that bill or Amendment having been expressly declared by this Court not to provide "overall legislative representation in the two houses of the Colorado Legislature sufficiently grounded on population to be constitutionally sustainable under the Equal Protection Clause," there simply is no material issue now before this Court. Amendment 7 was void and declared so, and it is impossible out of that Amendment, voted as a whole, to pick bits and scraps for preservation.

B. A law adjudged unconstitutional is void for all purposes.

It is argued that, if there had been approval of a 39 member Senate as opposed to 35, it would not be void; if there had been approved single-member districts, as a separate matter, they would be valid; and that machinery for securing future reapportionment might if approved be legally operable. Though each of these provisions *might have been* valid if approved by the people, none of them was as such approved or separately submitted for approval, but all were part and parcel of a package, the essential ingredients of which were unconstitutional. Any *speculation* as to what the people *might have done* had the matters been separately submitted to them is idle. Legislation, and certainly constitutional amendment, cannot exist on a fundament of the speculative. It must be certain.

In this circumstance, the People of Colorado are the legislative body. Unless it can be stated with certainty that they would have enacted the fragments of Amendment 7, knowing the basic apportionment scheme contemplated by Amendment 7 to be inoperative, nothing can save the fragments.

A law, whether it be statute or constitutional amendment, adjudged to be unconstitutional, is as if it had never been. It is void for all purposes. Nothing can be done under it, nor rights be built upon it. The Colorado Supreme Court has expressed this matter in *Coulter vs. Routt County*, 9 Colo. 258, 11 Pac. 193 (1886):

> "Mr. Cooley lays down the rule thus: 'When a statute is adjudged to be unconstitutional, it is as if it never had been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.' . . . " (at page 267).

C. The rule, both as to the effect of invalidity and as to separability, is identical for constitutional provision and for statute.

Constitutional invalidity has the same effect, both as to negation of the enactment, and as to severability, whether the invalid enactment be a statute or a constitutional provision. *People vs. Max*, 70 Colo. 100, 198 Pac.

150 (1921), declared invalid an attempted constitutional provision requiring referendum of judicial decisions involving constitutional questions. Invalidating the provision, the Court remarks that "the rule as to the divisibility of a constitutional provision, a portion of which is held void, is the same as that applied to a statute under similar conditions. 'Where a separation can not be made, and the invalid provision completely detached and treated as independent, the whole act must be pronounced void.'" (at page 104).

To the Colorado Supreme Court in that case it was "inconceivable that the people of Colorado would ever have enacted this law had they realized that in no event could it ever be applied further than to their own constitution, or that they would ever have considered the advisability of taking from their own courts the power to construe their own constitution had they realized that while the Constitution of the United States stands they were impotent to deprive those same courts of power to construe that charter."

It is similarly difficult to conceive that the people of Colorado would, willy-nilly, have changed their Senate from 35 to 39 members, without any substantive reason, or place for assignment, or demonstrated need, the scheme requiring that number being manifestly invalid; or that they would have voted in favor of a "reapportionment" measure, appearing on the ballot specifically as such, when that measure, though captioned as an act "For the *apportionment* of the senate and house of representatives of the general assembly, etc." was utterly inoperative as to any apportionment feature. No act, apart from an apportionment act, was submitted to them concerning numbers

of representatives, nor singularity or multiplicity of district, and it is not permissible to conjecture what they might have done if such an act had been submitted.

It is an interesting query what becomes of the Colorado Constitution if fragments of Amendment 7 be adopted. Textually, which fragments of that Amendment stand, and which go; which whole or partial sections of the former constitution remain in the text, and which are obliterated? There is no answer readily available, and its lack, we submit, dooms appellants' proposition.

The principal subject matter of Amendment No. 7 was *apportionment*. The apportionment is void, beyond question. No provisions thereof survive. As stated by the Colorado Court, in *In Re House Bill No.* 165, 15 Colo. 595, 26 Pac. 141 (1890), when asked about the validity of certain proposed legislation: "Upon consideration of the various matters involved in the questions submitted, we are of the opinion that the principal provisions of the bill, with which the remaining provisions are inseparably connected in substance, cannot be upheld as constitutional; and hence the answer to the legislative inquiry must be that the bill as a whole is unconstitutional. Cooley, Const. Lim. p. 178." (at page 507).

D. An act, void in part, may be sustained as to the remainder only if the defective portion is so unimportant the legislation would have been passed without it.

Leddy vs. People, 59 Colo. 120, 147 Pac. 365 (1915) holds clearly that where one section of a statute is found to be beyond the legislative power and is of such importance that plainly the act would not have been passed with-

out it, then all sections and provisions relating to the matter of the section condemned must fall. It is difficult, so, to see how, when the apportionment provisions of an apportionment amendment fail absolutely, the subsidiary portions can stand. Discussing the matter at page 123 of the Report, the Court said:

> "It is urged that the fact that one section of a law is void does not necessarily make the entire statute invalid; and that such parts of the statute as may, independent of the invalid section, accomplish the purpose evidently intended by the law are valid and should stand. Hence, it is contended that though sec. 46 be invalid, the other sections which constitute a system of loaning school funds may be effectually carried out without it, and are therefore valid.
>
> "This is true only in case that section be found to constitute *so unimportant a part of the loaning system* devised by the legislature, *that it is plain that the legislature would have passed the act without it.* Howard vs. Illinois C. R. Co. 207 U. S. 463, 52 L.Ed. 297, 28 Sup. Ct. 141." (Emphasis supplied).

Can it be said in anywise here that the apportionment provisions of Amendment 7 were so unimportant that the people of the State would have passed the amendment knowing that it did not apportion at all? We submit this "inconceivable".

This Honorable Court has held, and the Colorado Supreme Court has relied upon it in holding, that when different sections of a legislative act are so inter-dependent as to constitute an integral scheme of regulation, if one part thereof be declared invalid, then the whole must fall.

Thus, relying upon decisions of this Court, the Supreme Court of Colorado set forth the rule in *People vs. Morgan,* 79 Colo. 504, 246 Pac. 1024 (1926), invalidating certain cattle quarantine and inspection laws because invalid as applied to non-residents of Colorado, and because it could not be assumed that the provisions were intended to apply to Colorado, if their external effects were eliminated: (at pages 508-9).

> "The elimination of section six of the act suggests the question as to whether the remaining portion of the law can be sustained, under the provisions of section seven — the effect on the remainder when a part has been declared unconstitutional.
>
> "We would give effect to the remainder if we could, if otherwise valid and in keeping with the intention of the legislature. But from the standpoint of the legislative intent, it cannot be sustained. To uphold the law, it would have to be made applicable to residents of Colorado, whereas the act itself plainly declares that such is not its purpose.
>
> "In order to sustain the statute, we would have to create a valid measure out of an invalid one, by inserting provisions that the act does not contain. In the language of Mr. Chief Justice Taft, in Hill vs. Wallace, 259 U.S. 44, 70, 42 Sup. Ct. 453, 66 L.Ed. 822, 'This is legislative work beyond the power and function of the court.'
>
> "When it is plain that the legislature would not have passed the act without the section condemned, the whole act must fall with it. Leddy vs. People, 59 Colo. 120, 147 Pac. 365; Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565, 22 Sup. Ct. 431, 46 L.Ed. 679.

> "The different sections of the act of the Legislature above set out are so inter-dependent, so 'essentially and inseparably connected in substance,' that when one falls, the whole structure goes down. 1 Lewis' Sutherland Statutory Construction 576, Sec. 296; Arthur v. State, 148 Tenn. 434, 256 S.W. 437; Howard v. Illinois C. R. Co., (Employers' Liability Cases) 207 U.S. 463, 501, 28 Sup. Ct. 141, 52 L.Ed. 297."

It is submitted that Appellants here request that this Court effectively make, from the bits and snatches of an invalid act which Appellants essay the electorate *might have passed* had the same been submitted to them, a Constitution for the State of Colorado. The People of Colorado alone make their constitution, so long as it is in consonance with the Constitution of the United States. It certainly cannot be assumed that they would have accepted as parts thereof, scrapping the existing fabric thereof, those shards of an apportionment measure left over after the apportionment itself was broken. The area is one at best of conjecture, and if conjectural, then invalidity follows as of course.

Denver vs. Lynch, 92 Colo. 102, 18 P.2d 907 (1932) involved the validity of an old age pension law, declaring the same invalid because the legislature purported to confer judicial duties upon officials of other departments, and because the Court conceived that the administrative provisions so invalid so colored the whole of the act as to render it non-severable. The Court states as principle that "if the invalid portion of an act was apparently *an inducement to passage of the valid*, the statute is not severable, nor can an essential part, which colors the whole, be striken as invalid, and the remainder be sustained."

It cannot be said that the apportioning portions of an apportionment act are not an "inducement to passage" of the remainder; that they do not "color" the same. Except for the invalid scheme of apportionment, why 39 members of the Senate? Except for the apportionment, indeed, why the Act?

> "An act or a statute may be constitutional in one part and unconstitutional in another, and, if severable, the invalid may be striken and the valid left stand. 6 R.C.L., p. 121, #121. The power of the court to make such a decision rests primarily upon legislative intent. If we may reasonably presume that the General Assembly would have passed this act with the commissioners eliminated and the sole power to fix the amount of the allowance vested in the county judge, we may thus emasculate and thus sustain it. Id. p. 123, #122. *If the invalid portion of the act was apparently an inducement to the passage of the valid, the statute is not severable.* Id. p. 125, #123. *Nor can an essential part of an act, which colors the whole, be stricken as invalid and the remainder sustained.* Id. p. 127, #125." (pages 107-8). (Emphasis supplied).

So rooted in reason is the rule that even an express severability clause will not save an enactment an integral part of which is void. *American Federation of Labor et al. vs. Reilly, et al.*, 113 Colo. 90, 155 P.2d 145 (1945) involved the question of validity of the Colorado Labor Peace Act. The trial court held sections requiring compulsory incorporation invalid, but upheld the remainder of the Act. The Supreme Court held that where one provision of a section of a legislative act was invalidated, the entire section must fall where its other provisions are so inseparably inter-

twined and predicated upon the invalid features as to be unable to stand without them. The Court further, and most importantly, found that legislature "deliberately and expressly" so intertwined procedure for strike vote with the interdicted incorporated procedures that all must perish. "To fill this vacuum would require rewriting the act, which no court properly may do." (at page 102).

The language is substantially parallel to that of Mr. Justice Taft in *Hill vs. Wallace*, quoted above, and approved in *People vs. Morgan*, and of course is sound. It is not for the Courts to make a constitution for the people out of fragments it is supposed they might have approved in circumstances other than exist.

In *Four County Dist. vs. Commissioners*, 149 Colo. 284, 369 P.2d 67 (1962), a complex case involving the constitutional validity of statutes authorizing the formation of a four-county capital improvement district, and invalidating the same as in violation of the principles of municipal home rule expressed in the Colorado Constitution, the Colorado Court quoted at length that material above quoted from *Denver vs. Lynch*, and held that "the impact of the statute upon the City and County of Denver, and all the home rule cities included within the area, is such that the affairs of such cities cannot be severed from the operation of the statute, even though it might be upheld against numerous other challenged to its validity. The test of severability is stated by this court in *Denver vs. Lynch*, 92 Colo. 102, 18 P.2d 907, as follows: (quoting the referred matter)." Accordingly, that very major Act fell as a whole.

E. The Colorado court has recognized as void Amendment 7, and has itself expressed in strongest terms the test of severability as regards apportionment legislation.

As we have mentioned in outlining the facts concerning the present controversy, the United States District Court, upon remand by this Court of *Lucas vs. General Assembly*, held Amendment 7 to be non-severable and to have been wholly voided by that decision, and ordered elections for 1964 under a legislative enactment passed in consonance with the Colorado Constitution as it existed prior to Amendment 7.

A question was raised, not here in issue, as to whether or not, under the Colorado Constitution and Article V, Section 47, quoted above, single-member districts were permitted. Two of the three judges of the United States District Court thought they were and so held.

Two original proceedings before the Colorado Supreme Court, *White vs. Anderson*, ... Colo. .... (No. 21252), 394 P.2d 333, and *MacDonald vs. Love*, ... Colo. .... (No. 21373), 394 P.2d 345 (July 17, 1964), raised the issue whether that preexisting Article V, Section 47, of the Colorado Constitution does or does not permit single-member districts.

It is to be borne in mind that the litigation involved only the *old provisions* of the Colorado Constitution. Such provisions could have been in effect *only* if Amendment 7 was totally void. If it were not, and if the matters were as the Appellants claim them, the cases would have been moot entirely, for the districting provisions of Amendment 7 would have been applicable, and the meaning of

Article V, Section 47, would have been without consequence.

In the first of the cases mentioned, The Secretary of State of Colorado and the Clerk and Recorder of Pueblo County were parties Defendant, represented, as are the Appellants here, by the Attorney General of Colorado, In the second of the cases, Governor Love, the Secretary of State, the Attorney General, and the Forty-Fourth General Assembly are the Defendants. The cases were consolidated for hearing, and the same opinion governs both. Thus, the official parties who here appear as appellants were principally before the Colorado Supreme Court, and apparently did not there contend, as they do here, that Amendment 7 is still in effect as to districting, but apparently argued, and the cases were decided upon, the proposition that pre-existing Article V, Section 47, permits single-member districts.

As we have mentioned above, this Court in footnote 21 to its Opinion in *Lucas vs. General Assembly*, indicates that no federal constitutional problem inheres whether election be by single member districts or at large.

Whether or not the single-member district is permissible, then, under Article V, Section 47, of the Colorado Constitution becomes primarily a matter of state constitutional law.

The Colorado Court stated that "we defer to the federal court in the resolution of federal questions", and in its opinion quoted from *Lucas vs. Forty-Fourth General Assembly* [Reporter, pages 334-5], reversing for unconstitutionality of Amendment 7 and remanding to the United States District Court.

The Colorado Court further states:

> "A course of action looking to the preservation of elections was pursued by state officials. Rather than petition for a re-hearing in Lucas with its time-consuming pace of resolution, the Governor convoked a special session of the legislature *for the purpose of apportioning the state in accordance with Article V, Section* 45-47, *of the State Constitution.* Such special session received approval of the three judge federal court to which had been remanded the Lucas case. (Emphasis supplied).

The language is the clearest recognition by the Colorado Supreme Court that Amendment 7 does not exist in whole or in part, and that it is concerned only with the provisions of Article V, Section 45-47, as they existed before purported amendment.

The Court then considers solely what it considers "dictum expressed by two judges, to which the third raised his dissent, [which] declared that division of counties into multiple senatorial and representative districts was valid." It considered only the meaning of Section 47, Article V, which it and all parties before it, including the official Appellants who are moving parties before this Court, apparently conceded was in full force and effect, Amendment 7 being void. The Colorado Court disagreed with the United States District Court, and held that under Article V, Section 47, the single-member districts were not permissible.

The Court specifically discussed the question of *severability* with reference to apportionment matters [at pages 337 et seq.]:

"We must now determine whether the portions of the Act dealing with the division of single counties into multiple legislative districts are severable from the remainder of the Act. As illustrative of the difficulties confronting the court in any attempt to hold the invalid portions of the Act to be severable from valid portions, we refer to Section 1 and Section 2(f) of the Act.

"Section 1 of the Act provides that there shall be only one senator for each senatorial district. Section 2(1) of the Act provides that 'There shall be nine senatorial districts within the City and County of Denver,' (not nine senators from Denver), and then proceeds to set up those senatorial districts. If we strike Section 2(1) from the Act as invalid, we are left with no senatorial districts in Denver nor with any provisions for senators from Denver. The same situation applies to other counties which have been divided into multiple districts.

Without representation from Denver and from other multiple district counties, the Act obviously cannot stand. In determining a section to be severable we may certainly strike a section of that Act as invalid, but we cannot enact another section to take its place, for that is solely a legislative function. And if the purposes of the Act cannot be carried out without the section which is striken, as it cannot be here, then the Act is not severable the entire enactment must fail. City and County of Denver vs Lynch, 92 Colo. 102, 18 P.2d 907, 86 ALR 907."

The Colorado Court then held that, despite the weakness of the Senate Bill under Article V, Section 47, of the

Colorado Constitution, it was perfectly possible to hold an election under that Bill and the Order of the United States District Court, since the Bill did not offend and was in consonance with the requirements of the Fourteenth Amendment and the Lucas case. The Colorado Court stayed its order until after the election of the 45th General Assembly, and the elections were conducted in accordance with the requirements of the Order of the United States District Court and the provisions of Senate Bill No. 1.

It is clear from these Colorado cases that Amendment 7 has no effect whatsoever, and that, as a matter of State Constitutional Law, it has been recognized by the Colorado Supreme Court, as well as by the official defendants who are here appellants, that the old constitutional provisions, Article V, Sections 45-47, are in full force and effect.

It is further clear that if, as the Colorado Court points out, the provisions of a legislative act separating and dealing with the separation of counties into single-member districts as part of an apportionment statute cannot be severed from the parts of that statute dealing with apportionment, then most certainly those sections of Amendment 7 dealing with permissive creation of single-member districts cannot be separated from the remainder of the Amendment, when the totality of the apportionment as continued in the Amendment fails as unconstitutional.

The Colorado Supreme Court decisions were unappealed. Defendant state officials and General Assembly, who are here among the appellants, were parties there. The cases are finally at rest and disposed of. In view of these circumstances, it is most respectfully submitted that there is simply no substantial issue to be decided by the

Supreme Court of the United States in this appeal, and that fundamentally it is attempt to imperil an election which has already been held under the orders of the United States District Court, with acquiescence of the Colorado Supreme Court, and to reverse a ruling of the Colorado Supreme Court on the meaning of the Colorado Constitution, which has become final and has been unappealed, and time for appeal of which has passed. Moreover, the questions here presented appear to be questions entirely resolved in the statements of this Court in its Opinion heretofore rendered in *Lucas vs. General Assembly*.

CONCLUSION

For each of these reasons, we most respectfully submit to this Honorable Court that it is manifest that the questions on which decision of this appeal depends, and sought to be presented thereby, are so insubstantial, and have heretofore been so entirely resolved, as to need no further argument and to present nothing for determination by this Honorable Court. It is accordingly prayed that the said appeal be dismissed, and that the judgment below be affirmed.

Most respectfully submitted,

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